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**BEFORE THE
SURFACE TRANSPORTATION BOARD**



STB DOCKET NO. AB-103 (Sub- No. 21X)

**KANSAS CITY SOUTHERN RAILWAY COMPANY
ABANDONMENT EXEMPTION
LINE IN WARREN COUNTY, MS**

ENTERED
Office of Proceedings

APR 22 2008

Part of
Public Record

**REPLY TO
KCSR'S MOTION TO STRIKE**

1 Now comes Raymond B. English and James Riffin ("E&R" or "Offerors"), who herewith file this Reply to KCSR's April 25, 2008 Motion to Strike, and say:

BACKGROUND INFORMATION

3 On February 22, 2008, the Board Served its decision In The Matter Of A Request To Set Terms and Conditions ("Decision") in the above entitled proceeding. In its Decision, the Board stated *inter alia*:

If the Offerors accept the terms and conditions for the Entire Line, then by March 24, 2008, the Offerors may return to the Board with a request to determine the compensation, if any, owed by the Kansas City Railway Company ("KCSR") due to increased costs of restoring the Remainder to service that was caused by the partial dismantling of the Glass Road Bridge ("Bridge")

4. On March 24, 2008, the Offerors filed their Request for Compensation, which listed the estimated cost to restore the Glass Road bridge.

5 On April 11, 2008, the Offerors filed a Supplement to their Request for Compensation, asking the Board to award E&R the costs associated with preparing their Request for Compensation.

6 On April 14, 2008, the Kansas City Southern Railway Company ("KCSR"), filed its Reply to Request for Compensation Due to Increased Costs of Restoring Line to Service Caused By Partial Dismantling of the Glass Road Bridge ("KC Reply" or "Reply").

7. On April 22, 2008, E&R filed their Comments regarding KCSR's Reply to E&R's Request for Compensation.

8. On April 25, 2008, KCSR filed a Motion to Strike E&R's April 22, 2008 Comments

SUMMARY OF KCSR'S MOTION TO STRIKE

9. KCSR argued in its Motion to Strike, that E&R's Comments should be stricken because:

- A E&R's Comments constitute a reply to a reply, which the Board's rules do not permit.
- B. To restrain overzealous parties such as E&R.
- C To impose control over the Board's docket.
- D. To close the record
- E. The Board's February 22, 2008 Decision allowed KCSR to have the final say.

10. KCSR further argued that if the Board denies KCSR's Motion to Strike, KCSR should be permitted to file a reply

REPLY TO MOTION TO STRIKE

11. Unlike KCSR, E&R believe this case should be decided after a careful analysis of all available evidence. KCSR, on the other hand, wants to exclude relevant evidence that does not support its position.

12. The unlawful demolition of the Glass Road bridge presents a number of issues that have never been before the Board In effect, the parties are charting new territory A considerable amount of money is at stake. There are two aspects to this controversy: First, was the bridge

serviceable prior to its destruction? Second, what would it cost to restore the bridge? The first question involves forensics, since no one inspected the bridge immediately before its destruction. The second question is more straight forward. Prior to resolving this controversy, it would be appropriate for the Board to have as complete a record as possible. Consequently, any evidence that bears upon the condition of the bridge prior to its untimely destruction, should be admissible. Likewise, any evidence that bears upon the cost to restore the bridge, should also be admissible.

13. KCSR, in footnote 6, on p. 7 of its Motion to Strike, listed some of the numerous cases holding a reply to a reply is permitted, providing doing so would provide the Board with a more complete record, and providing doing so serves to further Due Process. E&R did not cite applicable cases, since the Board is cognizant of its precedents. Since KCSR is making an issue of whether the Board should accept E&R's Comments, E&R will provide the Board with legal argument why E&R's Comments should be admitted.

14. The Board has accepted a Reply to a Reply numerous times, "in the interest of compiling a complete record." See *JP Rail, Inc. – Lease and Operation Exemption – NAT Industries, Inc.*, FD 35090 (Served Jan 18, 2008), *City of Peoria and the Village of Peoria Heights, IL – Adverse Discontinuance, Pioneer Industrial Railway*, FD AB 878 (Served November 19, 2007).

15. In *City of Colorado Springs and Metex Metropolitan District – Petition for Declaratory Order – Abandonment Determination, et al.*, FD No. 31271 (ICC decided March 22, 1989) 1989 ICC LEXIS 78, *27-*28, the Commission held that where a party to a proceeding raises new issues in response to a prior filing, due process may entitle an opposing party to respond substantively thereto. In this case, KCSR raised several new issues when it filed its Reply to E&R's Request for Compensation.

- A. KCSR should not be required to provide compensation for the partial dismantling of the Glass Road bridge for the following reasons.
 - a. KCSR did not dismantle the bridge, did not authorize Warren County to dismantle the bridge, and received no benefit due to the bridge being dismantled.
 - b. The bridge had not been ascribed a specific value by either party.

- c. Providing E&R with compensation would result in KCSR receiving less than the constitutional minimum value of its property
 - d E&R should seek compensation from Warren County, rather than KCSR
 - e The Board has no authority to require KCSR to pay for actions that it did not do.
- B. The bridge would have needed to be replaced or substantially rebuilt before it could have been used
- a. The bridge's deck was rotted, and thus was not usable.
 - b. The ballast on the bridge was fouled, and thus was not usable
- C. The bridge could be restored for \$19,277.
- a. No engineering inputs are needed.
 - b. The bridge could be restored without replacing the piles that were destroyed
 - c KCSR would be willing to provide used material at no cost
 - d. Whatever new materials were required, could be obtained at a cost which is less than the cost indicated by E&R.
 - e The bridge could be restored using less rental equipment.

16. E&R would argue Due Process entitles E&R to respond substantively to these new issues. E&R would further argue, the Board's precedent permits E&R to respond substantively to these new issues, "in the interest of compiling a complete record."

17. It should be noted, on March 7, 2008, more than two weeks before E&R's deadline for filing its Request for Compensation, E&R served KCSR with E&R's First Set of Discovery Requests, which directed KCSR to provide E&R with the information KCSR intended to include in its Reply to E&R's Request for Compensation. Had KCSR timely responded to E&R's Discovery requests, E&R would have included in its Request for Compensation, the evidence and argument E&R presented in its Comments (which were intended to supplement E&R's Request for Compensation). Since E&R received KCSR's partial response to E&R's Discovery requests the day after E&R was required to file its Request for Compensation, E&R was prevented by KCSR from including in E&R's Request for Compensation, the evidence E&R

presented in E&R's Comments.

18. One of KCSR's main arguments, is the bridge deck and ballast retaining timbers were rotted. The information available to E&R prior to filing its Request for Compensation, strongly suggested otherwise. Contained in KCSR's records, was a 1986 bridge inspection report and a number of photographs which depicted the Glass Road bridge at the time KCSR filed its abandonment exemption. These photographs directly contradict KCSR's assertion that the deck and ballast retaining timbers were rotted. In spite of having this photographic evidence in its possession, which clearly shows the deck and ballast retaining timbers were in serviceable condition at the time the photograph was taken, KCSR persisted in arguing the deck and ballast retaining timbers were rotted, relying upon unsupported hearsay from the individual who directed the demolition of the bridge, which hearsay contradicted statements this same individual made to Mr. Riffin. Rather than rely upon unsupported, unverified hearsay testimony from an individual who would derive a financial benefit from any finding that the deck material was rotted, and thus had no value, E&R think it is more appropriate to base one's conclusions upon the photographic evidence that was contained in KCSR's own files, namely KCSR's Photograph No. 14 and Photograph KCSR - 045, which E&R provided to the Board in E&R's Comments, and which E&R incorporate by reference herein. Both of these photographs were in KCSR's files at the time KCSR misrepresented to the Board that the deck and ballast retaining timbers were rotted. But for E&R's Discovery request, this material evidence would have been withheld from the Board by KCSR. Striking this material evidence from the record, would inflict a grave injustice upon E&R, and would perpetuate the untruthful statements made by KCSR.

19. E&R received a copy of the 1986 bridge inspection report of the bridge when they received KCSR's Discovery materials **the day after** E&R filed their Request for Compensation. In its Reply, KCSR grossly misrepresented the findings contained in John McGregor's 1986 bridge inspection report. **The inspection report clearly stated the condition of each segment was "good."** (Last column.) KCSR represented to the Board that **"This report DOES NOT indicate that the Bridge was in operating condition and implies the Bridge was in need of maintenance."** (Emphasis added.) According to the Report, the only maintenance that was needed, was the addition of some ballast in one of the headwalls, which has no relevance to the

issue before the Board. (The parties have agreed there is no need to restore the headwalls, since they were not damaged) Whenever a party misrepresents facts to the Board, the other party has a right to bring that misrepresentation to the attention of the Board, which E&R did in their Comments. 49 CFR §1103.27 (b) states.

“(b) It is not candid or fair for a practitioner knowingly to misstate or misquote the contents of a paper, .. or to assert as a fact that which has not been proved, or to mislead his opponent by concealing or withholding positions in his opening argument upon which his side then intends to rely.”

(c) It is dishonorable to deal other than candidly with the facts in taking the statements of witnesses, in drawing affidavits and other documents, and in the presentation of cases.”

20. KCSR in its Reply, misrepresented that engineering input was unnecessary E&R in their Comments, quoted from 49 CFR 213, which states otherwise.

21. KCSR in its Reply, argued that framed bent construction would be an acceptable alternative. E&R in their Comments, quoted from 49 CFR 213, which suggests otherwise KCSR failed to indicate what framed bent construction entailed, and conveniently omitted salient details associated with framed bent construction, such as the fact that the broken piles would have to be cut (KCSR argued no piles would need to be cut), and the framed bent would be placed below grade, where it would be subject to corrosion and could not be easily inspected

22 KCSR represented to the Board that it would be willing to provide E&R with used material, which would reduce the cost of restoring the bridge What KCSR failed to reveal to the Board, were the significant liability issues that would be associated with using used material, and made no representations regarding the structural characteristics or integrity of this used material.

23 KCSR represented to the Board that a pick-up truck had the same utility as a boom truck, but failed to reveal to the Board how heavy bridge timbers are KCSR may have rightfully presumed that the Commissioners and their staff never have built, nor watched the building of, a timber trestle bridge, so would not know how ludicrous this suggestion was

24 KCSR argued for the first time, that because no specific value had been prescribed for the bridge, ordering KCSR to pay the cost to restore the bridge, would be unconstitutional. Since this legal argument was first raised by KCSR, E&R would be denied their Due Process rights if they were not permitted to respond to this legal argument.

25. KCSR argued that if the Board denies KCSR's Motion to Strike, KCSR should be permitted to file a response to E&R's Comments. E&R would agree KCSR should be permitted to respond. As stated earlier, E&R believe the record should be fully developed before a decision is rendered.

26 Given the time constraints in this proceeding, the fact that KCSR made it clear KCSR was concerned about the fast approaching settlement date (Motion at p.7), E&R find it puzzling KCSR argued they should be permitted to file a reply, but failed to include a Reply with their Motion to Strike. As stated above, E&R would have no objection to KCSR filing a Reply. In fact, E&R would prefer it if KCSR addressed the issues E&R raised in their Comments, such as the issue of liability associated with using used materials; the issue of putting structural components below grade, where they would not be readily accessible for inspection, the issue of how one would construct a bent frame on top of broken-off piles, without cutting off the broken stubs of the broken piles, the issue of how one could justify not having an engineer evaluate the bridge, since the FRA's regulations state a bridge subjected to "unusual impacts," needs to be evaluated by "an engineer;" the issue of how one would move heavy timbers from a storage location to a position adjacent to the bridge, with a pick-up truck; the issue of how one would "evaluate" the remaining piles for bearing capacity, without the use of a crane with a pile-driving attachment, the issue of why KCSR should be held to a different standard than that enumerated by the 6th Circuit in *Railroad Ventures*; the issue of how E&R would obtain legal standing to file suit against Warren County, when Warren County destroyed an asset that belongs to KCSR, not E&R.

27. KCSR objected because E&R have been "overzealous" in this proceeding. Perhaps it has been awhile since KCSR's counsel read 49 CFR §1103.21, which states

"A practitioner shall put forth his best effort to maintain and defend the rights of his client. Fear of disfavor of the Board or public unpopularity should not cause a practitioner to refrain from the full discharge of his duty. The client is entitled to the benefit of any and every remedy and defense authorized by law. The client may expect his counsel to assert every such remedy or defense." (Emphasis added)

28 KCSR asked the Board to muzzle E&R in order to "impose control over the Board's docket." E&R would argue the Board is quite capable of controlling its docket, and does not need prodding from a party

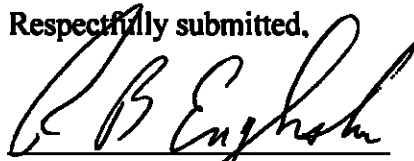
29 KCSR asked the Board to close the record. When the Board has been given a complete record, that would be the appropriate time to close the record. Unless KCSR presents new issues or offers to the Board additional misrepresentations, or a decision is rendered in the next few days which would be relevant in this proceeding, E&R would stipulate that following KCSR's reply to E&A's Comments, the record is sufficiently complete to render a decision regarding E&A's Request for Compensation. As for the consequences associated with the recent flood event, those could be addressed via a Petition to Reopen, if appropriate


30 WHEREFORE, for the foregoing reasons, E&A would respectfully ask that the Board DENY KCSR's Motion to Strike E&A's April 22, 2008 Comments, and

31. Permit KCSR to file a reply to E&A's April 22, 2008 Comments (and to this Reply to KCSR's Motion to Strike, if KCSR is so inclined), providing KCSR's reply is received by the Board no later than Monday, May 5, 2008, and

32. For such other relief as would be appropriate and just.

Respectfully submitted,


Raymond B English


James Riffin

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of April, 2008, a copy of the foregoing Reply to Motion to Strike, was e-mailed and was mailed via first class mail, postage prepaid, to **William A. Mullins, Baker & Miller PLLC**, Ste 300, 2401 Pennsylvania Ave, N W , Washington, DC 20037, attorney for Kansas City Southern Railway Company, and was mailed to **Craig Richey**, 315 W 3rd Street, Pittsburg, KS 66762, attorney for Vicksburg Southern Railroad, Inc.



James Riffin